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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1970

No. 600

ALCIDES PEREZ,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA,

*Respondent.*

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**PETITIONER'S BRIEF**

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**PETITIONER'S BRIEF**

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**Opinion Below**

The United States Court of Appeals for the Second Circuit rendered an opinion by Circuit Judge Wilfred Feinberg. It is reproduced in the Single Appendix, pp. 13a-32a. This opinion is reported at 426 F. 2d 1073.

**Jurisdiction**

The United States Court of Appeals for the Second Circuit entered its judgment on May 1, 1970. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254(1) by a Petition for a Writ of Certiorari filed on August 26, 1970 and granted by the Court on November 16, 1970.

### **Question Presented**

Whether Chapter 42 of Title 18, United States Code, Sections 891, 892, 893, and 894 constitute unconstitutional exercises of legislative power by Congress.

### **Constitutional, Statutory and Other Provisions Involved**

Article I, Section 8, Clause 3 and Clause 4 of the Constitution of the United States;

Tenth Amendment of the Constitution of the United States;

Title 28, United States Code, Section 1254(1);

Title 18, United States Code, Sections 891, 892, 893, and 894;

Section 201, Public Law 90-321: Congressional Findings and Declaration of Purpose;

Title 18, United States Code, Section 1952.

### **Statement of the Case**

The Petitioner, Alcides Perez, was convicted in the United States District Court for the Eastern District of New York before the Honorable George Rosling and a jury on five counts of using extortionate means to collect or attempt to collect extensions of credit within the Eastern District of New York in violation of Title 18, United States Code, Sections 891 and 894. The Petitioner was sentenced to eighteen months imprisonment on each count to run concurrently.

The Petitioner challenged the constitutionality of the statutes under which he was convicted by a motion to dismiss the indictment at his trial and in his appeal of the subsequent conviction to the United States Court of Appeals for the Second Circuit. The Court of Appeals found Chapter 42 of Title 18, the Federal anti-loan sharking statute, constitutional, the Honorable Paul R. Hays, Circuit Judge, dissenting.

Title 18, United States Code, Chapter 42, Sections 891 through 896 deal with "extortionate credit transactions" and was enacted as Title II of the Consumer Credit Protection Act of 1968. The statute was a far reaching attempt to control "the vicious billion dollar a year loan sharking racket". Section 891 defines "extortionate extension of credit" as one in which the understanding of both creditor and debtor is that failure to make timely repayment "could result in the use of violence or other criminal means to cause harm to the person . . ." Title 18, United States Code, Section 891.

Section 892(a) imposes the onerous penalty of imprisonment of not more than twenty years or a fine of not more than \$10,000.00 or both for the making of an extortionate extension of credit. Sub-section (b) of Section 892 sets forth various indicia that characterize extortionate credit extensions such as excessive interest rate, legal unenforceability of the obligation, and the reasonable belief of the creditor that he will come to harm if he fails to comply with the terms of his agreement.

Section 893 proscribes the "financing of extortionate credit transactions."

Finally, Section 894(a) punishes the collection or attempt to collect credit extensions by "extortionate means". Section 894(a)(1) provides the same penalty as enumerated in Section 892(a), *supra*.

### Legislative History

The statutory system here involved had its inception in an Amendment offered on the floor of the House of Representatives to a Bill undertaking consumer protection in a variety of areas. The original Amendment, presented and passed on February 1, 1968 (See the Congressional Record, H 706, February 1, 1960), contained a number of proposed legislative findings detailing the alleged impact on interstate commerce of "loan sharking" activities.

The bill itself, however, as then proposed, undertook to prohibit loan-sharking in a variety of ways only where there was an actual impact proved on interstate commerce or where interstate facilities were in any way utilized.

The ultimate bill was a result of extensive rewriting in the conference between the House and Senate. It is obvious the two critical decisions were made during the process of rewriting. The first was to eliminate the necessity for proving in individual cases that commerce was affected by seeping legislative findings that loan sharking was an activity of organized crime, that organized crime operated across state lines and that the transactions described were in interstate commerce areas or affected it. The second decision was to rely on congressional power to establish uniform laws of bankruptcy as an alternative basis for the congressional action undertaken.

## ARGUMENT

**Chapter 42 of Title 18, United States Code, Sections 891, 892, 893 and 894 constitute unconstitutional exercises of legislative power by Congress.**

With full awareness of the sweep of judicial decisions that have sanctioned increasingly broad exercise of Congressional power under the commerce clause, the Petitioner nonetheless contends that the statutory sections under which he was tried and convicted represents an invalid exercise of Congressional power.

In the section embodying Congressional findings and declaration of purpose two purported bases were set forth for the unprecedented exercise of power that was undertaken.

The first basis was, of course, the congressional power under the commerce clause (Article 1, Section 8, Cl. 3, United States Constitution).

The second basis was found in the Congressional power to establish uniform and effective laws on the subject of bankruptcy (Article 1, Section 8, Cl. 4, United States Constitution). This will be discussed later but it may be appropriate to comment here simply that no exercise of Congressional power under the bankruptcy section remotely resembling that set forth in the statutory sections involved has ever been undertaken before, that there is no judicial authority in point, and that the use of the bankruptcy authority on its face is strained, labored, and bizarre.



## A.

**The Commerce Clause**

Despite the fact "that almost all federal criminal statutes are so drafted that the connection with federal interests—the federal jurisdictional peg—must be proved in each case because such connection is incorporated into the definition of the offense", *United States v. Perez*, 426 F. 2d 1073 at 1075, the instant legislation proscribes all extortionate credit transactions whether or not, in an individual case, the transaction affects interstate commerce. Rather than require that the Federal underpinning be proven in each prosecution Congress instead asserted its jurisdiction on the basis of certain "Findings and Declaration of Purpose:

(a) The Congress makes the following findings:

(1) Organized crime is interstate and international in character. Its activities involve many billions of dollars each year. It is directly responsible for murders, willful injuries to person and property, corruption of officials, and terrorization of countless citizens. A substantial part of the income of organized crime is generated by extortionate credit transactions.

(2) Extortionate credit transactions are characterized by the use, or the express or implicit threat of the use, of violence or other criminal means to cause harm to person, reputation, or property as a means of enforcing repayment. Among the factors which have rendered past efforts at prosecution almost wholly ineffective has been the existence of exclusionary rules of evidence stricter than necessary for the protection of constitutional rights.

(3) Extortionate credit transactions are carried on to a substantial extent in interstate and foreign commerce and through the means and instrumentalities of such commerce. Even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce.

(4) Extortionate credit transactions directly impair the effectiveness and frustrate the purposes of the laws enacted by the Congress on the subject of bankruptcies.

(b) On the basis of the findings stated in subsection (a) of this section, the Congress determines that the provisions of chapter 42 of title 18 of the United States Code are necessary and proper for the purpose of carrying into execution the powers of Congress to regulate commerce and to establish uniform and effective laws on the subject of bankruptcy." Section 201 of Pub. L. 90-321, 82 Stat. 146, 159 (1968).

These Findings and Declaration of Purpose constitute the supporting structure upon which Congress erects federal prohibitions against all extortionate demands for repayment of monies regardless of the jurisdictional character of the underlying transaction, as well as supplanting the customary proof of impact upon interstate commerce.

The effect of relieving the Government of the burden of proving the interstate element in the Trial Court in the manner of the statutory requirement under Section 1952 of Title 18, United States Code, prompts a comparison between this statute and the analysis of the presumption of knowledge of illegal importation as made by the Court in *Leary v. United States*, 395 U.S. 6. Applying the "rational connection" test employed there to this case, the

**Findings and Declaration of Purpose themselves show how short they fall.**

#### **FINDING ONE**

**In a statute designed to strike at organized crime, Congress has made a finding that organized crime is interstate in character and that a substantial part of its income is found to be generated by extortionate credit transactions.**

**At best, Congress has indicated that some extortionate credit transactions are a source of revenue to organized crime but flowing therefrom is not the rational connection between all extortionate credit transactions as a class and organized crime.**

**Congress did not inquire into extortionate credit transactions per se or to the effect of such transactions on interstate and foreign commerce. The evidence before Congress was specifically directed towards the involvement of organized crime in this type of criminality. As for instance, before the Select Committee on Small Business, May 14, 1968, the Chairman, Senator George A. Smathers, said "The purpose of the present hearings is to build a factual record on the impact of organized crime on the nation's smaller business enterprises." Hearings on Impact of Crime on Small Business, S. Comm. on Small Business, 90th Cong., 2d Sess. (1968), Statement of Senator George A. Smathers, Page 1. This language described the purpose of the Congressional efforts in the other hearings conducted. Federal Effort Against Organized Crime: Report of Agency Operations, House Report No. 1574, 90th Cong., 2d Sess. (1968); Hearings on the Federal Effort Against Organized Crime, S. Comm. on Government Operations, 90th Cong., 1st Sess. (1967).**

## FINDING TWO

Congress has here described some of the less attractive aspects of these types of credit transactions but offers little guidance therein to assist in determining whether there was a valid exercise of Congressional powers in the enactment of the statute.

## FINDING THREE

At face value Congress indicates that there are extortionate credit transactions in interstate commerce but it also acknowledges that there are credit transactions "purely intrastate in character". Without the benefit of evidentiary findings or a factual basis Congress has found here that these credit transactions "purely intrastate in character" "directly affect interstate commerce". Thus, Congress declares a particular area of criminal conduct subject to its regulatory powers under the commerce clause and indiscriminately sweeps a broad mass of intrastate crime into that class. Congress makes a federal offense of a pattern of intrastate criminal behavior which cannot be magnetically attracted into the proscribed category under the diminimus analysis referred to in *Maryland v. Wirtz*, 392 U.S. 183. As indicated above in commenting on Finding One, Congress was not taking evidence on extortionate transactions per se, but was investigating organized crime.

Although this Court has upheld the power of Congress under the Commerce Clause to regulate apparently intrastate activities, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), *Katzenbach v. McClung*, 379 U.S. 294 (1964) and *Maryland v. Wirtz*, 392 U.S. 183 (1968), never has this Court upheld such regulation over so broad and unrestricted a class. This statute bars all extortionate credit transactions regardless of amount, relationship be-

tween the parties, the number of such transactions made by a co-defendant, or whether the lender is independent or in association with others. The unqualified, all-pervasive scope of conduct proscribed here stands in sharp contrast to previous legislation of this kind where Congress has required a definite and limiting relationship to interstate commerce. In *Atlanta Motel, supra*, the statute was applicable only to motels which provide lodging to transient guests; In *McClung, supra*, to restaurants that served food, a substantial portion of which had "moved in commerce"; and in *Maryland v. Wirtz, supra*, to employees of enterprises engaged in commerce or in the production of goods for commerce.

"Every trivial, insignificant and purely local act of the kind condemned is made a federal crime without any requirement of showing any connection with or effect upon interstate commerce. It is quite clear that not every extortionate act, no matter how small the debt involved, has any significant effect on interstate commerce.

There is no reason to believe that using threats to collect debts has any more effect upon interstate commerce than any other crime involving property. If extortionate conduct unrelated to interstate commerce can be made a federal crime, so can such crimes as robbery, burglary and larceny."

*Dissenting Opinion of Judge Hays, United States v. Perez, 426 F. 2d 1073 at 1082.*

If Congress can punish under the Commerce Clause local loan-sharking solely on the basis of its own unreviewed, irrefutable findings, can it not punish any crime relating in any way to money or property committed anywhere in this country?

## B.

**Bankruptcy Clause**

Article 1, Section 8, Clause 4 of the United States Constitution authorizes Congress to establish "uniform laws on the subject of bankruptcies throughout the United States . . . ." As explained in the conference report on this legislation, the purpose of the bankruptcy laws was to permit debtors to discharge certain obligations, and that purpose could not be achieved with regard to obligations concerning which extortionate means were employed. To undertake to impose criminal penalties with regard to loans to individuals not in bankruptcy and who do not go into bankruptcy on the possibility that they might go into bankruptcy, seems to us an extravagant interpretation of the bankruptcy power. If the bankruptcy section is found to sustain this kind of power, it is hard to visualize any kind of commercial transaction for which a rationale could not be found that would bring it within the Congressional bankruptcy clause.

In large measure we rest our attack on the fourth finding on the words of Judge Hays in his dissenting opinion in the Court below:

"The statute is clearly not a uniform law on the subject of bankruptcy. Congress has sought to justify the statute on the ground that, if extortionate means are used to collect an extension of credit, the debtor may be deprived of his right to a discharge in bankruptcy. But this reasoning would lead logically to the conclusion that under the Bankruptcy Clause Congress could exercise complete control over all economic activity since almost any such activity might have some effect on a bankrupt's debts. The power of Congress under the Bankruptcy Clause does not appear to us

to be capable of such an all-inclusive construction. Making a federal crime of every threat to collect or attempt to collect an extension of credit is not reasonably related to assuring debtors of their right to discharge in bankruptcy. The relationship is so artificial and tenuous that the power to enact the statute cannot properly be rested on the Bankruptcy Clause." *Dissenting Opinion of Judge Hays, Page 20 United States v. Perez*, 426 F. 2d 1073.

The basis for this statutory scheme is invalid and unconstitutional.

### C.

#### The Evidence Before The Legislature

Whatever evidence that Congress had before it at the time of the enactment of the statute offered no real support to the validity of the findings. For instance, The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime.

"No comprehensive analysis has ever been made of what kinds of customers loan sharks have or of how often each kind borrows." *The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime*, at page 3.

"Evidence of the lack of professional attention to the economy of the underworld is the absence of reliable data even on the magnitude involved, of techniques for estimating them—even of a conceptual scheme for distinguishing profits, income, turnover, transfers, waste, destruction, and the distribution of gains and losses due to crime." Schelling, *Economic Analysis and Organized Crime*, *The President's Com-*



*mission on Law Enforcement and Administration of Justice, Task Force Report: Organized Crime, page 114.*

The testimony of various witnesses before the Select Committee on Small Business, United States Senate, 90th Cong., on May 14, 15, and 16 of 1968, if anything revealed the lack of definitive information rationally indicating what percentage of credit transactions were interstate in character and what percentage were intrastate, or what credit transactions were connected with organized crime and what credit transactions were not.

The remaining evidence was similarly unilluminating.

## CONCLUSION

Chapter 42 of Title 18, United States Code, constitutes an indiscriminate federal proscription of intrastate criminal activity on the basis of insufficient legislative findings which are themselves unsupported by the evidence that was available to the Congress. Accordingly, the judgment of the Court below should be reversed.

Respectfully submitted,

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**APPENDIX TO PETITIONER'S BRIEF**

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## **Constitutional, Statutory and Other Provisions Involved**

### **Article 1, Section 8, Clause 3 and Clause 4:**

Article 1, Section 8, of the Constitution of the United States provides in relevant part:

“The Congress shall have power . . .

Clause 3 To regulate commerce with foreign nations, and among the several states, —

Clause 4 To establish uniform laws on the subject of Bankruptcies throughout the United States; —”

### **Tenth Amendment:**

The Tenth Amendment of the Constitution of the United States provides:

“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

### **Title 28, United States Code, Section 1254(1):**

§ 1254. Courts of Appeals; Certiorari; Appeal;  
Certified Questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment of decree.

### **Title 18, United States Code, Section 891:**

§ 891. Definitions and Rules of Construction For  
The Purposes of This Chapter.

*Constitutional, Statutory and Other  
Provisions Involved*

(1) To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

(2) The term "creditor", with reference to any given extension of credit, refers to any person making that extension of credit, or to any person claiming by, under, or through any person making that extension of credit.

(3) The term "debtor", with reference to any given extension of credit, refers to any person to whom that extension of credit is made, or to any person who guarantees the repayment of that extension of credit, or in any manner undertakes to indemnify the creditor against loss resulting from the failure of any person to whom that extension of credit is made to repay the same.

(4) The repayment of any extension of credit includes the repayment, satisfaction, or discharge in whole or in part of any debt or claim, acknowledged or disputed, valid or invalid, resulting from or in connection with that extension of credit.

(5) To collect an extension of credit means to induce in any way any person to make repayment thereof.

(6) An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to

***Constitutional, Statutory and Other  
Provisions Involved***

cause harm to the person, reputation, or property of any person.

(7) An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person.

(8) The term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and territories and possessions of the United States.

(9) State law, including conflict of laws rules, governing the enforceability through civil judicial processes of repayment of any extension of credit or the performance of any promise given in consideration thereof shall be judicially noticed. This paragraph does not impair any authority which any court would otherwise have to take judicial notice of any matter of State law.

**Title 18, United States Code, Section 892:**

**§ 892. Making Extortionate Extensions of Credit.**

(a) Whoever makes any extortionate extension of credit, or conspires to do so, shall be fined not more than \$10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, if it is shown that all of the following factors were present in connection with the extension of credit in question, there is prima facie evidence that the extension of credit was extortionate, but this subsection is nonexclusive and in no way limits the effect or applicability of subsection (a):

***Constitutional, Statutory and Other  
Provisions Involved***

(1) The repayment of the extension of credit, or the performance of any promise given in consideration thereof, would be unenforceable, through civil judicial processes against the debtor

(A) in the jurisdiction within which the debtor, if a natural person, resided or

(B) in every jurisdiction within which the debtor, if other than a natural person, was incorporated or qualified to do business at the time the extension of credit was made.

(2) The extension of credit was made at a rate of interest in excess of an annual rate of 45 per centum calculated according to the actuarial method of allocating payments made on a debt between principal and interest, pursuant to which a payment is applied first to the accumulated interest and the balance is applied to the unpaid principal.

(3) At the time the extension of credit was made, the debtor reasonably believed that either

(A) one or more extensions of credit by the creditor had been collected or attempted to be collected by extortionate means, or the nonrepayment thereof had been punished by extortionate means; or

(B) the creditor had a reputation for the use of extortionate means to collect extensions of credit or to punish the nonrepayment thereof.

(4) Upon making of the extension of credit, the total of the extensions of credit by the creditor to the debtor then outstanding, including any unpaid interest or similar charges, exceeded \$100.

*Constitutional, Statutory and Other  
Provisions Involved*

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence of any of the circumstances described in subsection (b) (1) or (b) (2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing the understanding of the debtor and the creditor at the time the extension of credit was made, the court may in its discretion allow evidence to be introduced tending to show the reputation as to collection practices of the creditor in any community of which the debtor was a member at the time of the extension.

Added. Pub. L. 90-321, Title II, § 202(a), May 29, 1968, 82 Stat. 160.

**Title 18, United States Code, Section 893:**

**§ 893. Financing Extortionate Extensions of Credit.**

Whoever willfully advances money or property, whether as a gift, as a loan, as an investment, pursuant to a partnership or profit-sharing agreement, or otherwise, to any person, with reasonable grounds to believe that it is the intention of that person to use the money or property so advanced directly or indirectly for the purpose of making extortionate extensions of credit, shall be fined not more than \$10,000 or an amount not exceeding twice the value of the money or property so advanced, whichever is greater, or shall be imprisoned not more than 20 years, or both.

Added Publ. L. 90-321, Title II, § 202(a), May 29, 1968, 82 Stat. 161.



*Constitutional, Statutory and Other  
Provisions Involved*

**Title 18, United States Code, Section 894:**

**§ 894. Collection of Extensions of Credit By  
Extortionate Means.**

(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof, shall be fined not more than \$10,000 or imprisoned not more than 20 years, or both.

(b) In any prosecution under this section, for the purpose of showing an implicit threat as a means of collection, evidence may be introduced tending to show that one or more extensions of credit by the creditor were, to the knowledge of the person against whom the implicit threat was alleged to have been made, collected or attempted to be collected by extortionate means or that the nonrepayment thereof was punished by extortionate means.

(c) In any prosecution under this section, if evidence has been introduced tending to show the existence, at the time the extension in question was made, of the circumstances described in section 892(b)(1) or the circumstances described in section 892(b)(2), and direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available, then for the purpose of showing that words or other means of communication, shown to have been employed as a means of collection, in fact carried an express or implicit threat, the court may in its discretion allow evidence to be introduced tending to show the

*Constitutional, Statutory and Other  
Provisions Involved*

reputation of the defendant in any community of which the person against whom the alleged threat was made was a member at the time of the collection or attempt at collection.

Added Pub. L. 90-321, Title II, § 202(a), May 29, 1968, 82 Stat. 161.

**Congressional Findings and Declaration of Purpose.**

Section 201 of Pub. L. 90-321 provides that:

(a) The Congress makes the following findings:

(1) Organized crime is interstate and international in character. Its activities involve many billions of dollars each year. It is directly responsible for murders, willful injuries to person and property, corruption of officials, and terrorization of countless citizens. A substantial part of the income of organized crime is generated by extortionate credit transactions.

(2) Extortionate credit transactions are characterized by the use, or the express or implicit use, of violence or other criminal means to cause harm to person, reputation, or property as a means of enforcing repayment. Among the factors which have rendered past efforts at prosecution almost wholly ineffective has been the existence of exclusionary rules of evidence stricter than necessary for the protection of constitutional rights.

(3) Extortionate credit transactions are carried on to a substantial extent in interstate and foreign commerce and through the means and instrumentalities of such commerce. Even where extortionate credit transactions are purely intrastate in character, they nevertheless directly affect interstate and foreign commerce.

*Constitutional, Statutory and Other  
Provisions Involved*

(4) Extortionate credit transactions directly impair the effectiveness and frustrate the purposes of the laws enacted by the Congress on the subject of bankruptcies.

(b) On the basis of the findings stated in subsection (a) of this section, the Congress determines that the provisions of chapter 42 of title 18 of the United States Code [this chapter] are necessary and proper for the purpose of carrying into execution the powers of Congress to regulate commerce and to establish uniform and effective laws on the subject of bankruptcy.

**Title 18, United States Code, Section 1952.**

§ 1952. Interstate and foreign travel or transportation in aid of racketeering enterprises.

Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity;  
or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on of any unlawful activity,

and thereafter performs to attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than \$10,000 or imprisoned for not more than five years, or both.

***Constitutional, Statutory and Other  
Provisions Involved***

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

Added Pub. L. 87-228, § 1(a), Sept. 13, 1961, 75 Stat. 498, and amended Pub. O. 89-68, July 7, 1965, 79 Stat. 212.